FILED
AUG 17 1951
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term 1951

No. 252

JOHN D. MCNABB, *Petitioner,*

v.

KATHERINE T. SLATER, ET AL.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit and Brief in Support Thereof

JOSEPH T. SHERIER,
GEORGE C. GERTMAN,
Washington, D. C.
Attorneys for Petitioner.

WILSON - EPES PRINTING CO. - RE 6003 - WASHINGTON 1, D. C.

INDEX

PAGE

Statement of Matters Involved 1

Jurisdiction 7

Questions Presented 7

Reasons Relied Upon for Allowance of Writ 8

Brief 11

Cases Cited

Andrus v. St. Louis Smelting & Ref. Co., 130 U. S. 643 16

Brach v. Moen, 35 F. (2d) 475 9

Copper Process Co. v. The Chicago Bonding and Insurance Co., 262 F. 66 14

Dellefield v. Blackdel Realty Co., 128 F. (2d) 85, 90 18

F. H. Smith Co. v. Low, 57 App. D. C. 167, 169 ..... 9, 19

Graffam v. Burgess, 117 U. S. 180, 29 L. Ed. 839, 843 ..... 9, 19

Henderson v. Henshall, 54 F. 320 17

Kell v. Trenchard, 142 F. 16 18

Mammoth Oil Co., et al. v. United States, 275 U. S. 13 12

Owen v. Schwartz, 85 U. S. App. D. C. 302, 177 F. (2d) 641 ..... 9, 19

Restatement of the Law of Torts, Sec. 547, Sec. 550 14

Sioux National Bank v. Norfolk State Bank, 56 F. 139 ..... 9, 17

Slater v. Ruggles, 49 App. D. C. 277 9

Stewart v. Wyoming Cattle Ranche Co., 128 U. S. 383 ..... 9, 14, 17

Strand v. Griffiths, 97 F. 854 17

Tooker v. Alston, 159 F. 599 ..... 9, 16

United States v. U. S. Gypsum Co., 333 U. S. 364, 395, 396; 92 L. Ed. 766 ..... 9, 11

Other Authorities

Rule 52 The Federal Rules of Civil Procedure 11

Section 547 subsection 2 and section 550 14

Restatement of the Law of Torts 14

In The

Supreme Court of the United States

October Term 1951

No. .....

John D. McNabb, *Petitioner,*

v.

Katherine T. Slater, et al.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

STATEMENT OF MATTERS INVOLVED

This is an equitable action brought by petitioner to set aside a deed conveying an apartment house, the recovery of $4,000.00 and the cancellation and surrender of promissory obligations for $8,500.00, upon the ground that they were secured by respondent Thomas by fraud.

The circumstances themselves, as hereinafter related, bespeak fraud.

In the year 1946 petitioner, for a consideration of $50,000.00, of which he paid twenty odd thousand dollars in cash, bought an apartment house in Washington, D. C., and in the year 1948 he listed it with the Senate Realty Company for sale or trade at $50,000.00. Upon learning of the above facts, respondent Thomas, a real estate man and formerly a peach orchard owner and operator, came to Washington early in June 1948 from his home in Tennessee and visited the apartment house and interviewed the tenants thereof. Presumably he learned beforehand from the Senate Realty Company the true value of the apartment house, what petitioner had paid for it, its net yield and the cost of its maintenance and operation. At that time G. L. Cleckler, also of Tennessee and a friend of respondent Thomas, owned and operated a peach orchard in Tennessee which he desired to sell or trade. At the trial of this case Cleckler testified that he had owned the orchard and had operated it through his foreman Heneker Parker since 1946 and up to July 14, 1948 when he sold and conveyed it to the respondent Thomas, the actual monetary consideration therefor being $7,000.00. Thomas, by deposition, admitted in evidence at the trial, testified that prior to July 14, 1948 Cleckler offered the orchard to him for $6,000.00, and Heneker Parker, the foreman, testified that in 1946 Cleckler offered the orchard to him for $6,000.00.

In June 1948 Thomas returned to Washington and met petitioner for the first time. Presumably Thomas knew that if he disclosed the real facts he would not be able to effect an exchange with petitioner of the apartment house, in which petitioner had an equity of $25,000.00, for a peach orchard worth only $6,000.00. Presumably Thomas also knew that if he revealed to petitioner the name of the owner, Cleckler, petitioner would doubtless talk with Cleckler regarding the value of the orchard, its past yield, the cost of its operation, the actual number of bearing peach trees and the actual acreage of the

orchard, etc. So, to interest petitioner in the proposed exchange of the properties and to keep petitioner in ignorance of the true facts, Thomas represented to petitioner that he was both the owner and operator of the orchard and had been such for two years. Thus petitioner was led to believe that he was dealing with the actual owner and operator and not with a salesman of the owner. He then also represented to petitioner that the orchard was worth $55,000.00, yet at that time he knew that Cleckler was offering it for sale at $7,000.00. And to further exaggerate the orchard he represented that it contained 140 acres while Cleckler testified at the trial that it contaiend 120 acres, more or less; also that in 1947 the orchard produced 22,000 bushels of peaches and that it cost $2,200 to operate the orchard that year. While making these representations petitioner asked Thomas to exhibit his records covering the year 1947 disclosing the yield and cost of operation of the orchard and Thomas replied that he kept no such records. At the trial Cleckler, owner and operator, testified that he kept and had such records.

Petitioner, being impressed by the representation that the orchard was worth $55,000.00, arranged with Thomas to visit the orchard with him. Accordingly, petitioner drove to Tennessee where he was a stranger and unacquainted, and stopped at Thomas's home overnight at his invitation. The next day they together drove to the orchard and Cleckler was there but petitioner at that time did not know him nor his connection with the orchard. If Thomas had acted in good faith and had not concealed from petitioner the fact that Cleckler was the owner of the orchard, petitioner doubtless would have inquired of Cleckler regarding the value of the orchard, its acreage, its yield in bushels of peaches in 1947 and its financial yield, etc. Though Thomas was present at the time, he did not introduce Cleckler to petitioner, but withheld from him the fact that Cleckler was the owner and

operator of the orchard. Thomas then drove petitioner miles away to an adjoining county to talk with S. Harrison, a friend of Thomas's, and a fruit broker. The substance of the conversation between petitioner and Harrison, as testified to by Thomas in his deposition, was:

> "He came to my home in Graysville, then we came to Chattanooga and he went out to the peach orchard and went over the whole orchard. That was in—be in June nineteen forty-eight, somewhere around the middle of the month, and I taken him up to Evansville and introduced him to a Mr. Harrison, S. Harrison, who was our fruit broker; been handling fruit for a good many years, berries, in that territory, and was very familiar with orchards and how they were handled, and asked him to tell Mr. McNabb what he knew about this orchard, since he'd been handling the fruit off of it for several years, which he did. He told him what he knew about the orchard, or what he thought of the orchard. It had been reset with young trees between the old ones, and the trees were in bearing, and take out the old ones as he seen fit, and still have a new orchard. And he also told him that the orchard, with the proper care and handling, with a full crop of peaches, would produce anywhere from twenty to thirty thousand bushels of peaches in one season. And he also told him what the orchard had been doing, the price they'd been getting and the kind of fruit, and I told Mr. Harrison what I had told Mr. McNabb, and asked him to verify that as to whether I was right or wrong in regard to the orchard, and we went over it and he said, well, he thought that was just about right."

After interviewing Harrison, McNabb contacted E. L. Tipps, the county agriculture agent in Rhea County, which adjoins Hamilton County, and in due course Tipps wrote McNabb (Defendants' Ex. 1):

> "I drove fifty-four miles yesterday checking over the O. E. Thomas peach orchard near Soddy. This orchard has from nine to ten thousand peach trees in it, and I believe there will be approximately 2500 to 3000 bushels of peaches harvested this year from this

orchard. No doubt if the rains continue there might be a little more harvested than the number of bushels I stated above. A large portion of peaches in the lowland seem winterkilled and the only peaches left are on the highlands. From all indications, it seems that there will be a good demand for peaches in this area. Most all the peach crop was killed by late frost this spring. If this orchard had some improvements made on it within the next few years, it would soon repay the owner in production within a short time."

There is no testimony that petitioner ever inquired of Harrison or Tipps or anyone else regarding the ownership of the orchard, its value, its acreage, what it produced in 1947 or cost of operation. Instead petitioner testified that he relied entirely upon the representations of Thomas regarding those matters.

Petitioner accompanied by Thomas then returned to Washington, D. C., and on June 12, 1948 the exchange contract was made by them, Thomas contracting as the owner of the orchard. By the contract petitioner, as the consideration for the orchard, agreed to convey the apartment house to Thomas's daughter, respondent Slater, as directed by Thomas, to pay Thomas $4,000.00 in cash and $8,500.00 in equal annual instalments of $2,125.00 each, and Thomas agreed to convey the orchard to petitioner.

Petitioner, to evidence his good faith, put up a cash deposit of $1,000.00, whereas Thomas put up nothing.

Upon securing the contract from petitioner, Thomas returned to Tennessee and in order to substantiate his representation of ownership of the orchard, he connived with a title insurance company to issue to him a certificate of title, dated July 13, 1948, which certified that Thomas and his wife were the owners of the orchard in fee simple as joint tenants, though, as above stated, Cleckler testified that he was the owner and operator of the orchard until July 14, 1948 when he sold it to Thomas for a consideration of $7,000.00.

Upon Thomas procuring said certificate of title he notified petitioner of his readiness to close the transaction in accordance with his contract, whereupon petitioner again went to Tennessee to make settlement and again he stopped at Thomas's home. Before going to Thomas' lawyer's office to make settlement, Thomas and petitioner again went to the orchard. At the lawyer's office Thomas handed petitioner the above mentioned certificate of title showing that he, Thomas, and his wife were the owners of the orchard. Thereupon petitioner drew and handed to Thomas two checks payable to his order, one for $2,750.00 and the other for $250.00. He also handed Thomas two promissory notes of $2,125.00 each. Clecker was present but Thomas did not inform petitioner regarding his connection with the transaction.

At the trial Cleckler testified that on July 14, 1948 he, for a consideration of $7,000.00, represented by petitioner's check for $2,750.00 endorsed over to him by Thomas, and the delivery by Thomas of his two promissory notes aggregating $4,250.00, conveyed the orchard to Thomas. Cleckler also testified at the trial that Thomas did not pay these notes and a foreclosure sale instituted by Cleckler followed, at which he bought back the orchard for $2,000.00.

Upon closing the transaction at the lawyer's office petitioner took possession of the orchard and began picking the peaches when he learned for the first time of the falsity of the representations Thomas had made to him regarding the orchard. He immediately returned to Washington and brought the present action.

The District Court dismissed the action upon two grounds, the first ground being that petitioner had not "clearly" proved the fraud charged, and the second ground being that petitioner did not rely upon the representations of Thomas but upon his own independent investigation of the *value* and condition of the orchard.

Upon appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed the judgment.

The net result of Thomas's duplicity and fraud is:

That Thomas's daughter, respondent Slater, is the record owner of petitioner's apartment house.

That Thomas and Cleckler, together, have $3,000.00 of petitioner's money and, besides, Thomas holds petitioner's promissory notes for $4,250.00.

Cleckler has regained title and possession of the orchard.

That neither Thomas nor the appellee Slater put a single dollar in money or property in the deal.

Petitioner has been stripped by Thomas of practically all of his material possessions.

JURISDICTION

This Court has jurisdiction to issue the writ applied for under Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. The United States Court of Appeals for the District of Columbia had jurisdiction under Secs. 1291, 1292, of Revised Title 28, U. S. Code, and the United States District Court for the District of Columbia had jurisdiction under Sec. 306 of Article 11 of the 1940 D. C. Code.

QUESTIONS PRESENTED

1. Where the evidence, direct and substantial, establishes that as the result of misrepresentation and concealment, an innocent party to a transaction is defrauded of his property, is not fraud automatically inferred?

2. Assuming the accuracy of the "Statement of the Matters Involved," is not the Court "left with the definite and firm conviction that a mistake has been com-

mitted" in the findings of fact by the District Court and the law applicable thereto?

3. Where one party to a business transaction undertakes to make inquiry and investigation regarding the subject matter of the transaction, but through the misrepresentation and concealment of the other party he is unable to discover the truth, is not the party who is misled entitled to relief from the wrong, notwithstanding his futile investigation?

4. Where one party to a business transaction is requested by the other party to furnish information regarding the subject matter of the transaction, is not the party thus called upon for information under a legal and moral duty to furnish the information, and if he fails to furnish available information or falsely states that there is no such information, has he not committed a fraud upon the party misled by such concealment?

5. Where the testimony of a party is in conflict with his own and other contemporary written documents, is his testimony to be preferred over that of the written documents?

REASONS RELIED ON FOR ALLOWANCE OF WRIT OF CERTIORARI

(1) It was established by clear and non-conflicting evidence that as the immediate result of misrepresentation and concealment by the respondent Thomas of material matters pertaining to the Tennessee orchard, such as the ownership and value thereof, he having represented that he was the owner of the orchard when in fact it was owned by Cleckler, and that it was worth $55,000.00 when in fact Cleckler had offered to sell it to Thomas for $6,000.00—, respondent Thomas himself secured from petitioner his equity of $25,000.00 in Wash-

ington real estate, $4,000.00 in cash, and promissory obligations aggregating $8,500.00—a total consideration of $37,500.00—in exchange for the $6,000.00 peach orchard. The law of the case is ruled by the following cited cases, in all of which the victim of the fraud prevailed in the appellate courts notwithstanding that independent investigation and inspection were made of the property there involved:

Stewart v. *Wyoming Cattle Ranche Co.*, 128 U. S. 383; *Tooker* v. *Alston*, 159 F. 599; *Sioux National Bank* v. *Norfolk State Bank*, 56 F. 139; *Brach* v. *Moen*, 35 F. (2d) 475; *Slater* v. *Ruggles*, 49 App. D. C. 277; *Owen* v. *Schwartz*, 85 U. S. App. D. C. 302, 177 F. (2d) 641 and *F. H. Smith Company* v. *Low*, 57 App. D. C. 167.

2. The decision of the United States Court of Appeals for the District of Columbia Circuit is in conflict with an applicable decision of this Court, namely, *Stewart* v. *Wyoming Cattle Ranche Co.*, supra.

3. The decision of the United States Court of Appeals for the District of Columbia Circuit is in conflict with three applicable decisions of courts of coordinate jurisdiction, namely *Tooker* v. *Alston*, supra; *Sioux National Bank* v. *Norfolk State Bank*, supra, and *Brach* v. *Moen*, supra.

4. The decision of the United States Court of Appeals for the District of Columbia Circuit is in conflict with three of its own applicable decisions, namely, *Slater* v. *Ruggles*, supra; *Owen* v. *Schwartz*, supra, and *F. H. Smith Company* v. *Low*, supra.

5. The decision of the United States Court of Appeals for the District of Columbia Circuit has not given proper effect to applicable decisions of this Court, namely, *Graffam* v. *Burgess*, 117 U. S. 180, 186, 194; and *United States* v. *U. S. Gypsum Co.*, 333 U. S. 364, 92 L. Ed. 766.

Wherefore your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Court of Appeals for the District of Columbia, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 10,761, *John D. McNabb, Appellant,* v. *Katherine T. Slater, et al, Appellees,* and that your petitioner may have such other and further relief in the premises as to this Court may seem just.

JOSEPH T. SHERIER
GEORGE C. GERTMAN
Attorneys for Petitioner

IN THE

Supreme Court of the United States

October Term, 1951

No. .....

JOHN D. MCNABB, *Petitioner*

v.

KATHERINE T. SLATER, ET AL.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Rule 52(a) of the Federal Rules of Civil Procedure provides that findings of fact in actions tried without a jury "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

However in the present case neither respondent Thomas nor his daughter, appellee Slater, testified at the trial, hence the District Judge had no opportunity to judge of their credibility.

In *United States* v. *U. S. Gypsum Co.*, 333 U. S. 395, 396, this Court said:

> "A finding 'is clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

The Court further said:

> "The Government relied very largely on documentary exhibits, and called as witnesses many of the authors of the documents. Both on direct and cross-examination counsel were permitted to phrase their questions in extremely leading form, so that the import of the witnesses' testimony was conflicting. On cross-examination most of the witnesses denied that they had acted in concert in securing patent licenses or that they had agreed to do the things which in fact were done. Where such testimony is in conflict with contemporaneous documents we can give it little weight, particularly when the crucial issues involve mixed questions of law and fact. Despite the opportunity of the trial court to appraise the credibility of the witnesses, we cannot under the circumstances of this case rule otherwise than that Finding 118 is clearly erroneous."

And in *Mammoth Oil Co., et al.* v. *United States,* 275 U. S. 13, this Court said:

> "Fraud is a sinister thing, difficult of apprehension. It is seldom there is any direct evidence thereof, but it cannot be proved by mere suspicion. It is generally established by legitimate inferences arising from circumstantial evidence."

The substance of the circumstantial evidence in the case at bar is related in the "Statement of the Matters Involved."

Here there was no evidence, substantial or otherwise, to support the finding of fact "that the plaintiff failed to sustain the burden of proof in that he failed to establish that any fraud or misrepresentation had been practiced upon him by respondent Thomas." On the contrary, the case is full of earmarks of fraud practiced by Thomas and the result of his machinations positively establishes the fraud.

That Thomas misrepresented to the petitioner that he was the owner of the orchard is clearly established, not

only by the oral testimony, but also by two writings signed by Thomas, namely, the exchange agreement in which he contracted as owner to convey the orchard property to petitioner, and another writing signed by Thomas in which he agreed to pay the real estate broker a commission of $1,000 for exchanging "my 140 acres". The misrepresentation is further clearly established by the title report given by Thomas to McNabb, which recited that Thomas and his wife were the record owners in fee simple as tenants by the entireties of the orchard property. The undisputed fact is that Thomas and his wife never had the record title to the property; it always remaining in Cleckler.

Thomas knew that if he told the petitioner the truth, that Cleckler was the owner and operator of the orchard and had been such for two years past and that he could be found at the orchard, petitioner, upon visiting the orchard, naturally would question him regarding the value of the orchard, its acreage and the number of acres of bearing peach trees, the number of bushels of peaches it had produced in 1947, what was realized from them, and the cost of operation of the orchard during those years; so, to thwart such inquiry of Cleckler—the only man who actually possessed such knowledge—Thomas represented himself as being both the owner and operator of the orchard, and the men at the orchard as his employees.

The undisputed testimony further shows that, when the petitioner requested Thomas to exhibit his records of the production and cost of operating the orchard for 1947, he stated that he kept no records. Cleckler, called as a witness for the respondents, testified that he kept and had records showing the production and cost of operation of the orchard for that year. Had Thomas not concealed from the petitioner the fact that Cleckler was the owner and that he had kept records, the petitioner would have been able by inquiry of Cleckler to ascertain the informa-

tion desired to enable him to investigate the subject matter of the transaction.

When Thomas was requested by petitioner to disclose his records showing the production and cost of operation of the orchard for 1947, it was his legal and moral duty to state the truth and not to misrepresent or conceal from petitioner the existence of such records. *Copper Process Co.* v. *The Chicago Bonding and Insurance Co.*, 262 F. 66.

By *Sec. 547, Sub-Sec. (2) of the Restatement of the Law of Torts*, the rule is stated as follows:

> "The fact that the recipient of a fraudulent misrepresentation is relying upon his own investigation does not relieve the maker from liability if he by false statements or otherwise intentionally prevents the investigation from being effective."

Sec. 550 states the rule thus:

> One party to a business transaction who by concealment or other action intentionally prevents the other from acquiring material information is subject to the same liability to the other as though he had stated the nonexistence of the matter which the other was thus prevented from discovering."

Nor is there any evidence, circumstantial or otherwise, which rightfully supports the finding of fact that "the plaintiff relied entirely upon the information gathered by himself, by independent investigation, as to the condition and value of the Tennessee property." There is not a word of testimony that petitioner ever obtained from any one any independent information regarding these matters.

In *Stewart* v. *The Wyoming Cattle Ranche Co.*, 128 U. S. 383, 32 L. Ed. 439-442, the purchaser, before entering into a contract of purchase, caused an inspection of the ranch to be made by an expert employed by it, and upon his favorable report entered into the contract of purchase. It developed that certain misrepresentations were made by the owner of the ranch to the person em-

ployed to make the inspection. In an action to recover damages for the false representations the purchaser recovered and the judgment was affirmed by this Court, saying:

> "In this case certain misrepresentations with respect to the number of cattle and calves on a large ranch were made to a foreign purchaser residing in Scotland. Before closing the purchase, the vendee sent a representative to Wyoming to inspect and report to it concerning the herd and other animals and equipment on the ranch.
>
> "Clay, plaintiff's representative, testified that, in the course of his interviews with the defendant, the latter made to him the false representations alleged in the petition, and requested him to rely on these representations and not to make inquiries from the foreman and other persons; and that, relying on the representations, he made a favorable report to the plaintiff, which thereupon completed the purchase. The plaintiff also introduced evidence tending to prove the other allegations in the petition. The defendant testified that he never made the representations alleged."
>
> "In an action of deceit, it is true that silence as to a material fact is not necessarily, as matter of law, equivalent to a false representation. But mere silence is quite different from concealment: ALIUD EST TACERE, ALIUD CELARE; a suppression of the truth may amount to a suggestion of falsehood; and if, with intent to deceive, either party to a contract of sale conceals or suppresses a material fact, which he is in good faith bound to disclose, this is evidence of and equivalent to a false representation because the concealment or suppression is in effect a representation that what is disclosed is the whole truth. The gist of the action is fradulently producing a false impression upon the mind of the other party; and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the deefndant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff."

> "The words and conduct relied on as amounting to false representations were those of the seller of a large herd of cattle ranging over an extensive territory, and related to the number of the herd itself, of which he had full knowledge, or means of information, not readily accessible to a purchaser coming from abroad; and the plaintiff introduced evidence tending to show that the defendant, while going over the ranch with the plaintiff's agent, made positive false representations as to the number of calves branded during the year, and also fraudulently prevented him from procuring other information as to the number of calves and consequently as to the number of cattle on the ranch."

In *Tooker et al.* v. *Alston,* 159 F. 599, (C. C. A.) 16 L. R. A. (NS) 818, 822, it appeared that the purchaser of a mine had been introduced by the vendor to the superintendent of an adjoining mine. This superintendent accompanied the purchaser on an inspection of the mine. The vendor remained on the surface. The superintendent said to the purchaser, "it just looks bully. It is just dandy—a bully good mine, or looks like it." When they returned to the surface the purchaser asked the superintendent his opinion and he replied, "it is a fine thing, if it is in solid ground." The vendor then replied, "there is no question about it. It is in solid ground." Whilst the vendee was in the town the vendor so attended him that he had little opportunity to secure disinterested advice .

In affirming a judgment in favor of the vendee, the court said:

> "The general rule is that a purchaser must exercise common prudence, and, if he fails to avail himself of the ordinary means of information, the law gives him no redress. Andrus v. St. Louis Smelting & Ref. Co., 130 U. S. 643, 32 L. Ed. 1054, 9 Sup. Ct. Rep. 645. But defendants cannot invoke this rule, because of their active efforts to conceal the condition of the

> mine, to thwart investigation and inquiry, and in misrepresenting the significance of conditions that were apparent. Such conduct brings the case within the salutary exception designed to avoid encouragement of fraudulent and deceitful practices. Strand v. Griffiths, 38 C. C. A. 444, 97 Fed. 854; Henderson v. Henshall, 4 C. C. A. 357, 7 U. S. App. 565, 54 Fed. 320. See also Stewart v. Wyoming Cattle Ranche Co., 128 U. S. 383, 32 L. Ed. 439, 9 Sup. Ct. Rep. 101. * * *
>
> "By the instruction in the next one, counsel sought the declaration of a rule that, if the plaintiff made an investigation himself, and consulted with others as to the condition of the mine or its value, there is a presumption of law that he acted upon information so gained, and not upon the representations of defendants. There is no such presumption of law. In Sioux Nat. Bank v. Norfolk State Bank, 5 C. C. A. 448, 12 U. S. App. 347, 56 F. 139, this court held that it was not a defense that plaintiff also made some other examinations and inquiries, if the conduct of defendants was a material, though not the sole, inducement to the transaction in question."

In *Slater* v. *Ruggles*, 49 App. D. C. 277, a case similar in character to the case at bar, in which a man and wife, as vendors, had been defrauded of their property by a shrewd and contriving real estate man, and where the man and wife had beforehand inspected the real estate which they took in exchange for theirs, the United States Court of Appeals for the District of Columbia said:

> "The various representations made by appellant, concerning the status and value of the properties in this District which he exchanged with appellees, were untrue, and were made for the obvious purpose of deceiving, and actually did deceive, appellees. Appellant's conduct, from the time he met appellees until he had absorbed practically everything they posessed, was characterized by such a lack of good faith that no other conclusion under the evidence could have been reached by the trial court. It was nothing short of a persistent and consistent scheme to deceive and

> defraud appellees, and the law would suffer reproach, were the suggestion to be entertained that the chancellor was without jurisdiction to right the wrong."

In its decision of the present case, the United States Court of Appeals for the District of Columbia said:

> "Thus, it is important to determine 'whether the parties stand on an equality'."

In the case at bar Thomas on the one hand and petitioner on the other did not stand upon an equality. Thomas was a shrewd real estate salesman and formerly a peach orchard owner and operator, whereas petitioner never owned nor operated a peach orchard but was engaged in administrative work for the American Red Cross and agencies of the United States.

In *Kell* v. *Trenchard,* 142 F. 16, the court, after discussing the principles announced in *Slaughter* v. *Gerson,* 13 Wall. 379, and other cases of like import, said:

> "The doctrine contended for in these cases as to the circumstances in which a party to the contract should have the right of rescission is clear; but is based upon the further principle that there must be no fraud, deception, or misrepresentation in the information given. In such case there can be no such thing as equality of information which is apparently open to each side. The law is well settled that a false representation by a vendor of a material fact constituting an inducement to the contract of purchase, and on which the purchaser had the right to rely, is a ground for the rescission of his contract by a court of equity, and that, too, though the party making the representation may have been ignorant as to whether it was true or false; the real inquiry being not whether the vendor knew the representation to be false, but whether the vendee believed it to be true, and was misled by it in entering into the contract."

And in *Dellefield* v. *Blackdel Realty Co.,* 128 F. (2d) 85, 90, the court said:

> "Defendants assert that statements as to value are only opinion, and not properly the foundation of an action for deceit. (Citations) While this may be generally true, it is recognized that under certain circumstances such representations may be actionable, as where they are put forth as a definite statement of fact by a party having superior or perhaps exclusive knowledge to one without such knowledge and misrepresent the actual views of the maker. (Citations)"

See also F. H. Smith Co. v. Low, 57 App. D. C. 167, 169, 18 F. (2d) 817, and Owen v. Schwartz, 85 U. S. App. D. C. 302.

Inadequacy of Consideration

The inadequacy of the consideration moving to McNabb in return for his $25,000.00 equity in the Washington property, his $4,000.00 in cash and his promissory obligations of $8,500.00—totaling $37,500.00 was so great as to shock the conscience of the court, as the value of the orchard was conclusively shown to be no more than $7,000.00—less than one-fifth of the amount paid by McNabb for it. In *Graffam* v. *Burgess,* 117 U. S. 180, 29 L. Ed. 839, 843, where a judicial sale was set aside for inadequacy of consideration, the court said:

> "From the cases here cited we may draw the general conclusion that if the inadequacy of price is so gross as to shock the conscience, or if in addition to gross inadequacy, the purchaser has been guilty of any unfairness, or has taken any undue advantage, or if the owner of the property, or party interested in it, has been for any other reason, misled or surprised, then the sale will be regarded as fraudulent and void, or the party injured will be permitted to redeem the property sold. Great inadequacy requires only slight circumstances of unfairness in the conduct of the party benefited by the sale to raise the presumption of fraud."

* * * *

> "It is true these observations, both of Mr. Kerr and *Chancellor* Desaussure, were made in reference to private sales between parties and do not strictly apply to judicial sales. But they show that great inadequacy of price is a circumstance which a court of equity will always regard with suspicion, unless it appears by the circumstances of the case, or by evidence, that it is no fault of the buyer." * * *

It is respectfully submitted that the petition for certiorari should be granted and the judgment of the court below be reversed.

JOSEPH T. SHERIER
1001 15th Street N. W.

GEORGE C. GERTMAN
American Security Bldg.
Washington, D. C.
Attorneys for Petitioner

FILED
SEP 21 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 252

JOHN D. McNABB, *Petitioner,*

vs.

KATHERINE T. SLATER.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR KATHERINE T. SLATER IN OPPOSITION

CHARLES G. JACQUETTE,
Attorney for Respondent.

Of Counsel:
CHARLES E. HUTSLER,
CHARLES K. CHAPLIN.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.